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# In the Supreme Court
## of the United States

E. C. F. SANCHEZ, et al.,
*Appellants,*
*vs.*
JAMES DEERING,
*Appellee.*

No. 536.

### STATEMENT OF THE CASE

For the sake of brevity we ask the Court to accept the statement of the case made by the District Judge reported in 288 Federal Reports, page 412 et seq.

The appeal from the decree of Judge Call presented chiefly a question of pleading, and required a construction of Equity Rule 29.

The Court of Appeals was asked to consider and determine whether the defense of laches may be made to appellants' bill by a motion to dismiss, which admits the truth of the statement of material facts alleged excusing delay of 22 years in seeking the aid of a Court of Equity during the first 15 years of which period their ancestor and they were without obligation to apply to any Court to maintain or secure their right and interest.

Without referring to Rule 29 or the cases cited construing this rule that Court avoided appellants' contention by the statement of an admitted general rule of equity practice, misapplied to the statement in the bill of complaint of the facts of this case.

The opinion states "The long delay and death of material witnesses appear on the face of the bill, and if they constitute laches the bill may be dismissed without requiring an answer."

We reply—(a) the long delay was sufficiently excused by material facts alleged in the bill, and admitted by the motion to dismiss: (b) the death of material witnesses does not appear on the face of the bill. Appellants' case and appellee's defense is not dependent upon the testimony of witnesses. Appellant's case rests wholly upon documentary proof: the record of marriages and births which could not be found for a long period of years, discovered immediately before the bill was filed.

The simple case which was presented to the Circuit Court of Appeals has become a case of great importance, and requires a more extended argument and citation of authorities because the opinion of the Circuit Court of Appeals is based upon the decision of this Court in Wilson Cypress Company vs. Marcos, 236 U. S. 635.

Record page 45.

Disregarding the express terms of the statute recited in the opinion as the law under which the grant to Pedro Fornells was confirmed—overlooking the decisions of the highest courts of Louisiana and Alabama construing acts of Congress in identical and practically identical words used in the Act of February 8, 1827, although the same was presented by brief and argument in extenso, the Court of Appeals followed this Court's reasoning and opinion in the case reported in 236 U. S. 635.

Judge Call refused to follow the opinion of this Court in the Marcos case and in his opinion in this case says: "I am of opinion therefore that it is from the issuance of

the patent that the title became perfect in this case although the survey was made and approved in 1847." Sanchez v. Deering, 288 Fed. text 415.

The Court of Appeals though it sustained Judge Call's decree bases its opinion upon a directly contrary view of the confirmatory law; makes the legal title vest 51 years earlier than in law and fact it did vest; and counts as the period from which the question of laches is to be determined a date more than 50 years before the United States parted with the legal title to the patented lands ceded by the Treaty of 1819 with Spain.

The Court cites the rule declared in Langdeau v. Hanes, 21 Wall 521, text 530, then misapplies it to a case where the fee passed to the United States by cession from Spain, and based its action on the opinion of this Court. Record page 45.

The primary duty of counsel is therefore to satisfy this Court that it fell into error in its reasoning and opinion in the case of Wilson Cypress Company vs. Marcos, reported in 236 U. S. 635. This duty necessitates a great extension of the argument and citation of cases otherwise irrelevant to the issues made by the pleadings.

The Court's special attention is called to the fact that the Marcos case was not finally decided on its merits. One matter of law only was decided—erroneously we are convinced—and the case left open upon remand.

Appellants do not collaterally attack the judgment rendered in the Marcos case; that stands as the law of that case until reversed on direct appeal.

When that case comes before this Court again we are mistaken in our estimate of the character of the members of this Court if they shrink from an acknowledgment of a plain error of judgment, or fail to recognize that the dignity and honor of this great Court requires that it shall alter its opinions where a plain mistake has been made.

The reasoning on which the one point decided in the Marcos case was based should not be extended to any independent case. It is contrary to the law as decided in numerous other cases in this Court, and contrary to the plain meaning of an Act of Congress as construed by the highest courts of Alabama and Louisiana, and by the Attorneys General of the United States, and the Land Department in numerous opinions.

## THE MARCOS CASE

The Marcos case presented for determination the title under a patent from the United States issued in 1895 to a tract of 5486 acres, claimed under a concession or inchoate title made by the Governor of East Florida to Miguel Marcos in 1815, on his petition for a grant of 5,500 acres of land. The concession was endorsed on the petition, of the quantity prayed for, wholly without descriptive boundaries or definite location, and as stated in the petition of Marcos' widow filed with the Commissioners for Settlement of Private Land Claims had never been surveyed. See Vol. 4 American State Papers (Gales & Seaton Ed.), pages 697-705; Duff Green ed. p. 471 et seq. Record in case of Wilson Cypress Company vs. Marcos, pages 114-115.

As recited in the patent this concession was confirmed by the Act of Congress Feb. 8, 1827 and May 23, 1828, to the extent of a league square.

Exercising the judicial powers vested in him by the Act of Feb. 8, 1827, Robert Butler, Surveyor General of Florida, had surveyed as public land all of Township 19 S., Range 28 E. in December, 1847. Record in case 135 October Term 1914, page 1026.

The 16th section in this township vested in the State of Florida on its admission into the Union in 1845. The State of Florida selected as Swamp lands approximately two thousand acres in Sections 22, 23, 24 and 25, in July

1856. This selection approved July 17, 1856, by John Westcott, Surveyor General, was confirmed by the Act of Congress approved March 3, 1857, and the land patented to the State of Florida March 14, 1872, as public lands granted under the Swamp Land Act of Sept. 28, 1850.

In 1851 Benjamin Putnam, Surveyor General of Florida, without authority of law approved a survey of the private claim of Teresa Rodriguez (widow of Marcos) which was laid down on the plat of the township surveyed as public lands approved in 1848, which covers the school section and the Swamp land selections in township 19 Range 28. This approved survey of the unconfirmed claim of Teresa Rodriguez is marked "diagram to be appended to Township 19, Range 28." Record case 135, October Term 1914, page 1027.

The records of the General Land Office establish that as late as 1894 the official plats in that office did not show the claim of Teresa Rodriguez. Record in Wilson Cypress Co. v. Marcos, pages 847-848. The heirs of Marcos plaintiffs in the trial court based their claim of title wholly on the patent from the United States. Wilson Cypress Company claimed under a tax sale made about the date the State of Florida took its patent for the lands selected and confirmed by the Act of March 3, 1857, as swamp lands. To sustain its tax title defendant in the trial court and on appeal contended that the concession to Marcos was a perfect grant, that the lands were private property before the cession of the Floridas—that it was confirmed without a survey and to its full extent and needed no patent; that the title was vested in the Spanish grantee prior to the date of tax sale. The patent recited that the claim was confirmed not to exceed a league square and "was confirmed by the Act of Congress of the 8th of February, 1827. See Statutes at Large Vol. 4, p. 202." Record in case 135 Oct. Term 1914, page 838 and 839.

This Court determined the question of date when the land became taxable upon principles which govern confirmed Mexican grants under the laws of 1851 and 1860, where the essential and substantive acts are only the confirmation and the survey. Under these statutes the patent is only evidence of a pre-existing title made perfect by those two acts. By the express words of the Florida statutes a judicial duty is to be performed by the Commissioner of the General Land Office before the confirmee is entitled to a patent.

The errors into which the Court fell are

(a) It assumed the character of the Marcos grant to be a perfect title, whereas it was established to be a first concession only. The lands described in the patent passed to the United States under the Treaty.

United States vs. Wiggins, 14 Peters, text 334-348-350.

(b) It accepted the statement of the Secretary of the Interior that "a league square" exceeded 5,500 acres.

(c) It assumed the grant was a confirmed grant. It was an unconfirmed grant after May 26, 1831.

The grant was confirmed to the extent of a league square only. By failure of the confirmee to comply with the Act of May 23, 1828, the confirmation failed, and the lands after May 26, A. D. 1831, were deemed to be public lands.

Menard v. Massey, 8 How. 293, text 308.
Mitchell v. Furman, 160 U. S. 402, text 438-439.
Estrada v. Murphy, 19 Cal., text 272.
United States v. Young, 8 Peters 484.

Unfortunately the case last cited was not on the briefs before the court. Council cited United States vs. Mitchell, 15 Peters, text 57-64-90-91 and United States vs. Perot, 98 U. S. 428 to show that the term "a league square" as used in the Act of May 23, 1828 was 4,428.68 acres. The latter case recites a letter dated 20th February, 1855, from the Commissioner of the General Land office to Mr. Justice Catron stating that it was the practice of the Land Office to consider a league equivalent to 4,340 27-100 acres.

The case of United States vs. Young is conclusive of the sole question decided in the Marcos case. The United States appealed from a decree of the Superior Court of East Florida confirming to Young a grant of 5,000 acres of land. The Superior Court took jurisdiction and decided the cause; the United States Attorney contested the case on its merits in the Court below, and from an adverse decree took an appeal upon the merits to this Court, which in A. D. 1834 considered the questions of fact and law, and on the merits confirmed the grant.

Without taking any notice of the allegations of the bill (paragraphs 15-16-19) or the cases cited as above set out this Court accepted the statement found in the opinion rendered by the Secretary of the Interior in the case of Private Land Claim of Teresa Rodriguez, Land Decisions Vol. 15, No. 341, February 12, 1894, that its decisions "with reference to Florida and Louisiana private land claims has failed to reveal any decisions" on the question of "What did Congress mean by the expression 'a league square.' "

The meaning of the term "a league square" was settled sixty years before when this Court decided the case of United States v. Young, supra.

This Court in the Marcos case wholly overlooked Sections 7 and 8 of the confirmatory Act of February 8, 1827. No reference is made in its opinion to this Act

of Congress, although it is recited in the patent (record in case 135 October Term 1914, page 839), and is controlling upon the question of the right of the Surveyor General of Florida to survey the lands described in the patent as a private claim, and of the date when the land became taxable and prescriptable.

See Section 6 of the Act of May 8, 1822, Section 7 of the Act of March 3, 1823, and especially Section 7 of this Act of 1827.

It accepted as an official plat the township plat marked "diagram to be appended to township 19 range 28," although it was established that the records of the General Land Office as late as 1894 contained no other official plat than the plat approved in 1847, showing all the township to be public lands.

It wholly overlooked the fact that upon the approval of the survey of township 19 range 28 in 1847 as public land the 16th section vested in the State of Florida as school land.

Without referring to any of them, and without in terms modifying any of them the Court overturned a uniform series of decisions of this Court from 8th Peters to 16th Howard, which for more than seventy years had been recognized as having established a rule of property, so that now neither the Land Department nor the local practitioner knows what the law is with respect to imperfect Spanish grants. If the principles established by the cases appealed from the Old Superior Court of East Florida are followed, one is met by the Marcos case. If this Court's decision in the Marcos case is followed, one is confronted by the uniform decision in the cases brought to this Court from the Superior Court of East Florida as also by the case of Mitchell v. Furman, 180 U. S. 402.

## THIS COURT IN THE MARCOS CASE FAILED TO NOTICE THE LAWS UNDER WHICH THE FLORIDA CLAIMS WERE SETTLED

Special attention of the Court is called to the Act of February 8, 1827, under which the Marcos claim was confirmed. The Act is entitled "An Act to Provide for the Confirmation and Settlement of Private Land Claims in East Florida and for Other Purposes."

Section 7 required the keeper of the public archives to furnish the surveyor of public lands a description of each claim confirmed—"which shall specially designate the quantity, locality and connection of such claim and where the confirmation may have been made on a grant or survey, a copy of the courses and distances contained in such grant or survey and the date of the survey or grant," and it shall be the duty of the surveyor of public lands in Florida to cause, under such instructions as he may receive from the Treasury Department, the said claims to be surveyed and connected with the township lines and public surveys and to give them their proper township and section numbers agreeable to such description, and he shall make separate plats and certificates of survey of the same, *one of which shall be returned to the register of the land office* for the district in which the land may lie *and the other* shall be delivered to the claimant; but it shall be the duty of the surveyor to withhold his certificate if he have reason to believe that the lands confirmed are other lands than those intended to be confirmed, or if it shall appear that *the survey under which the land is claimed* has been made subsequent to the date of the survey under which the claim was confirmed."

Section 8 enacted that so soon as said tracts of land shall have been thus surveyed and the surveys thereof returned to the office of the proper register, it shall be the duty of such register to issue certificates in favor of the claimants entitled thereto and *"if it shall appear to*

*the satisfaction of the Commissioner of the General Land Office that the certificates have been fairly obtained and correspond with the transcripts transmitted"* to the Secretary of the Treasury and the plat returned by the surveyor, patents shall be granted in like manner as provided by law for the other public lands of the United States.

As Sections 7 and 8 of this Act under which the Marcos claim was recommended for confirmation are almost in the same language as the Acts for the settlement of private land claims in the Territory of Louisiana which have been construed by the Attorney General and the Courts, we deem it proper to print certain sections of those Statutes.

Section 3, Act of April 12, 1814, Stats. at L., page 122, an act for the final adjustment of land titles in the State of Louisiana and Territory of Missouri.

It shall be the duty of the several registers of the Land Office and the recorder of land titles in the State or Territory aforesaid with whom the claims in their respective districts have been entered which are confirmed by this Act in all cases where the land has not been surveyd according to law to make out for the proper deputy surveyor of the district in which the land lies, an order of survey for each tract of land confirmed under this act, with a proper description of the tracts to be surveyed wherein the quantity, locality, boundaries and connection when practicable with each other, and the tracts which have been heretofore confirmed, shall be stated and on the return of the plat or survey, or, where an order of survey is not necessary, the said register or recorder of land titles shall on application for that purpose, make out for each claimant entitled thereto by the provisions of this Act a certificate of confirmation directed to the Commissioner of the General Land Office and if it shall appear to the satisfaction of said commissioner that such certificate shall have been fairly obtained according to the true

intent and meaning of this Act, then and in that case patents shall be granted in like manner as is provided by law for the other lands of the United States, etc.

Act for adjustment of claims to lands in the district east of New Orleans, approved March 3, 1819, 3 Stats. at L., 528.

Section 12. The Register and Receiver * * * shall make out to each claimant entitled in their opinion thereto, a certificate according to the nature of the case, under such instructions as they may receive from the Commissioner of the General Land Office, and on presentation at the General Land Office of such certificate for a confirmed claim or for a donation according to the provisions of this Act, and where it shall appear to the satisfaction of the Commissioner of the General Land Office that the certificate has been fairly obtained according to the true intent and meaning of this Act, then and in that case a patent shall be granted in a like manner as for other lands of the United States.

Section 2 of the Act of April 18, 1814, 3 Stats. at L., page 139 of the Act concerning certificates of confirmation to claims to land in the State of Louisiana.

That so soon as said tracts of land shall have been thus surveyed and the surveys thereof returned to the office of the proper register, together with the original certificates of the commissioners, it shall be the duty of said register to issue certificates in favor of the claimants entitled thereto, which he shall transmit to the Commissioner of the General Land Office, and if it shall appear to the satisfaction of said commissioner that the certificates have been fairly obtained and correspond with the transcript heretofore transmitted to the Secretary of the Treasury, and the plats returned by the surveyors, patents shall be granted in like manner as is provided by law for the other public lands of the United States.

Act of May 23, 1828, entitled "An Act Supplementary to the Several Acts Providing for the Settlement and Confirmation of Private Land Claims in Florida," by its first section confirmed the claims contained in the reports of the commissioners and the reports of the register and receiver to the extent of the quantity contained in a league square, to be located by the claimants within the limits of such claims or surveys filed before the commissioners, and within the bounds of the original grant, in quantities of not less than a section to be bounded by sectional lines.

Section 2 enacted that not more than a league square shall be confirmed within the bounds of any one grant, and no confirmation be effectual until the interested parties file with the register and receiver a full release of all claim to the residue contained in the grant, "and thereafter the excess in said grant shall be liable to be sold as other public lands of the United States."

Section 3 prescribes that the confirmations shall operate only as a release of any claim had by the United States.

Section 6 prescribed that all claims containing a greater quantity of land above a league square, not rejected by the commissioners, shall be received and adjudicated by the Judge of the Superior Court upon the petition of the claimant, according to the rules and limitations prescribed by the Act of May 26, 1824, for the settlement of private land claims in the Louisiana Territory.

Section 8 extended to Florida said Act of May 26, 1824.

Section 12 enacted that any claims to land not brought within one year from passage of the Act and not prosecuted to final decision within two years "shall be forever barred, both at law and equity, and no other action at common law or proceeding in equity shall thereafter be sustained in any court whatever."

The Act of January 23, 1832, 4 S. 496, entitled "An Act to Direct the Manner of Issuing Patents on Confirmed Land Claims in the Territory of Florida, enacted as follows:

"That all patents that are, or may be, by law, directed to be issued on private land claims confirmed by the commissioners of private land claims, and by the several Acts of Congress approving their reports and confirming the titles to lands in the Territory of Florida, shall be, and they are hereby, required to be issued to the confirmees, or to the assignee, or present owner, where the land has been sold or transferred since the confirmation of the title; and it shall be the duty of the Commissioner of the General Land Office, upon the production of a regular chain of titles from the confirmee, to cause the patent to be issued to the heirs and legal representatives, or to the assignees of the confirmee, as the case may be."

The Court's attention is called to Section 2447 of the Revised Statutes that it may note that this section provides for the issuance of patents in case of any claim to land heretofore confirmed by law and in which *no provision is made by the confirmatory* statute for the issue of a patent. In the Marcos case the patent was issued under Section 8 of the Act of February 8, 1827, a fact which this Court wholly failed to notice. If the Act of Dec. 22, 1854, 10 S. 599, Section 2447 R. S. did apply, no patent could issue until the Commissioner of the General Land Office found the plat of survey approved by the Surveyor General to be correct.

In the Marcos case record proof was made that the survey of the lands patented as a private claim was not shown on the official plats in the Surveyor General's office. Record on case 135, October Term 1914, page 848.

## ACTS OF CONGRESS IN THE WORDS OF ACT OF 1827 CONSTRUED

It will be observed that the Florida statute follows the form of the laws adopted for the settlement of private land claims in what is now Alabama, Louisiana and Missouri. All of these statutes are *in pari materia* and constitute one general plan adopted by Congress for the settlement of private land claims. It is manifest from the similarity of the several statutes above recited, that the adjudicated construction of any of those Acts is controlling with respect to the Florida statutes.

The Supreme Court of Alabama construed the Act of March 3, 1819, 3 Stats. 528, in McArthur v. Brue, 67th So. Rep. 249. It there says "The pivotal and decisive question here involved is whether the legal title to the land in question passed from the United States by an act of Congress, approved March 3, 1819, 3 Stats. 528 Ch. 100, or by patent of October 7, 1912. * * * It appears to us that the opinion and decision of this Court in the case of Nelson v. Weekly, 177 Ala. 130 and Michigan Land Company v. Rust, 168 U. S. 589, are decisive of this question, to the effect that the legal title to the land in question did not pass by the Act of Congress but only by the patent. * * * If the Act of Congress and the surveys merely authorized the grant to be made by patent, then of course the title passed only when the patent issued. This last condition we find from this record to be the true situation. It appears that there was not even an attempt to grant any land by the Act of Congress in question, but only to provide for a survey, location or identification of certain claims and when so located and identified for a grant for the issuance of a patent," etc.

The Act of March 3, 1819, was again construed by the Supreme Court of Alabama in Stein v. England, December, 1918, 202 Ala. 297, 80 So. Rep. text 363.

"Appellants seek to reverse the judgment of the lower Court whereby Appellee is entitled to lands * * * through inheritance from her ancestor,. Anthony Espejo. * * * Espejo's heirs presented their claims to this land to the * * * Commissioners * * * who reported the facts to Congress, *which, on March 22, 1819, confirmed the same* to the extent of 640 acres, which were duly surveyed and noted as belonging to the heirs of said Espejo on the maps of the United States Land Office filed * * * as early as 1831. The cultivation and use of the land were abandoned by Espejo's heirs and in 1870 the lands were regularly assessed for state and county taxes to unknown owners and were sold for taxes. This tax title, accompanied by actual, continuous, open, notorious and exclusive possession of the land under claim of ownership, adversely and hostile to the world passed by conveyance and inheritance to the Appellants in 1912. Since 1870 the lands have been assessed for taxes and the taxes paid by the Appellants and their predecessors in title. In January, 1913, some of the heirs of Espejo procured from the register and receiver of the United States Land Office * * * a private land claim certificate reciting that Espejo's claim to this land was confirmed by the Act of Congress of March 3, 1819, was surveyed as shown by the township plat approved in 1845, and that upon presentation of the certificate to the Commissioner of the General Land Office at Washington the heirs shall be entitltd to receive a patent. They then procured the issuance of the United States patent, dated April 30, 1913, reciting the certificate that the claim was confirmed by Congress in 1819 and was shown on the plats approved 1845 and that in consideration of the premises the United States patented the premises to Espejo's heirs. This suit was brought May 2, 1917, resulting in a judgment for the plaintiff."

The Court says: "The result of this appeal turns upon the question as to whether or not the lands sued for were subject to taxation or title thereto to be acquired

by adverse possession prior to the issuance of the patent. * * * It is admitted that defendants claim no interest under said patent, but in hostility thereto. Sec. 12 of the Act provides for the issuance of a certificate to the claimant by the register and receiver when in his opinion he (claimant) is entitled thereto, under such instructions as may be received from the Commissioner of the General Land Office; "which being presented, if that officer shall find" said certificate has been fairly obtained, according to the true intent and meaning of this act, then in that case a patent shall be granted as to other lands of the United States." The Court then cites from the case of Mims heirs v. Higgins, 39 Ala. 9. "It is impossible to resist the conclusion that by that provision the Commissioner of the General Land Office is clothed with the authority upon the presentation of the patent certificate to inquire whether it was fairly obtained according to the true intent and meaning of the Act, and if he decides that question in the negative to withhold a patent. Such an authority in the commissioner necessarily includes the power to review the act of the subordinate officers upon which the claim to a patent is predicated, for it would be absurd to say that the claimant had a perfect title by virtue of acts of subordinate officers, when because those acts were wrong, the commissioner has rightfully refused a patent; beside it would be utterly useless to give to the commissioner the power to refuse a patent where the certificate was wrongfully granted, if notwithstanding his refusal the claimant had a complete title." That "the act of the Commissioner of the General Land Office in determining whether or not the certificate had been fairly obtained according to the true intent and meaning of the act and therefore as to whether or not a patent should issue was a *judicial act* in that the commissioner was called upon to render a decision." * * * "The complete equitable title in this case did not pass from the United States until the patentees were entitled to demand

the patent as a matter of right. The certificate of the register and receiver was not obtained until January 31, 1913, and patent issued March 30, 1913. Up to this time the title was in the United States Government and the property was neither subject to taxation by the state, nor could title be acquired by adverse possession thereof." Citing Price v. Dennis, 159 Ala. 625 and Nelson v. Weekley, 177 Ala. 130 and 195 Ala. 1.

The Court further says the cases of Langdeau v. Hanes, 21 Wall 521 and Joplin v. Chachere, 192 U. S. 94 were distinguished in 177 Ala. 130.

The Act of April 12, 1814, was construed in Lafayette v. Blane, 3 La. Ann. 59, text 60-61. Held, "that act only confirmed title to lands claimed by virtue of incomplete French or Spanish grants, concessions, warrants or orders of survey, granted prior to Dec. 20, 1803, and having a special and definite location." * * * "We take the rule to be in order that the confirmation may have the force and effect of a patent, the description in the inchoate title, or the act of Congress must be such as will identify the land." The petition for confirmation filed with the Board recited that the Marcos claim had never been surveyed and was for 5,500 acres, about 2 miles north of Long Lake. 4 Am. St. Papers, pp. 471. 283 Duff Green Ed. pages 2-3 record in case 135 Oct. Term 1914.

By confirmation the United States recognizes the title derived from the former government, but such recognition extends only to the boundaries the grants themselves furnish.

McDonald v. Millaudon, 3 How. 693, text 706.
Slidell v. Grandjean, 111 U. S., 412, 28 L. ed. 330.

Confirmation is the assent to an estate already created * * does not create an estate.

Boquillas Cattle Co. v. Curtis, 213 U. S. 339-344.

From Public Land Laws, 1838, Vol. 2, page 863, Letter from the Commissioner to the Surveyor General of Florida, dated February 26, 1827:

"I have now the satisfaction to transmit a paper containing a copy of the act to provide for the confirmation and settlement of private land claims in East Florida, and for other purposes."

"You will perceive that the 7th and subsequent sections of this bill *provide for the surveying and connecting with the townships lines the private confirmed claims,* and for designating on the township plats the unconfirmed claims over 3,500 acres, which have been filed with the commissioners."

"The 7th section of this act has invested you with extensive powers, and very responsible duties, both executive *and judicial.*"

In July, 1922, the Marcos case was argued before Judge Bryan. It was then pointed out that the opinion of this Court reported in 236 U. S., 635, was as above set out directly contrary to its former decisions and the words of the Acts of Congress, which had been construed by the highest Courts of Alabama and Louisiana.

The learned Judge at the argument stated that he was bound by the decision of this Court in that case, and on the 26th of July, 1922, made a decree dismissing the bill as barred by laches.

If his conclusion was sound, he was bound only in his consideration of that case. If manifestly on the face of this Court's opinion it appeared the Court had fallen into error, the learned Judge was not bound to follow this Court's reasoning in the case at bar. Yet in determining the primary question of law involved, the Court of Appeals applied the reasoning in the Marcos case to the facts in the case at bar, and declared "The failure to assert

whatever interest appellants had continued for 50 years prior to the issuance of the patent, and in considering the question of laches the period of time involved extends over 73 years, or from 1847, the date of the survey, to 1920, when the bill was filed."

The finding of the Circuit Court of Appeals that the legal title to the grant to Fornells "vested in Mary Ann Davis in 1847 when the official survey was made" and that "The failure to assert whatever interests appellants had continued for 50 years prior to the issuance of the patent and in considering the question of laches the period of time involved extends over 73 years, or from 1847, the date of the survey, to 1920, when the bill was filed." Record p. 45, is so clearly error that a reversal should be had without further argument.

## WHAT TITLE DID THE LEGAL REPRESENTATIVES OF MARY ANN DAVIS TAKE UNDER THE PATENT FROM THE UNITED STATES?

The Act of 20 May, 1836, prescribes that "in all cases where patents for public lands have been or may be issued in pursuance of any law of the United States to a person who has died, before the date of the patent, the title of the land designated therein shall enure to and become vested in the heirs, devisees or assigns of such deceased patentee as if the patent had issued to the deceased person during life."

Galloway v. Finley, 12 Pet. 264, text 296.

Held by Field, J., that the act embraced a patent to a confirmed Spanish grant.

Waterman v. Smith, 13 Cal. 373, text 420.

The Board and the husband of Mary Ann Davis must have known that the Archives furnished full information

that the mother of Rafael Andreu left a last will containing recitation of her several marriages and names of her children, yet the claim presented by Mary Ann Davis was established by three affidavits presented to the Board with her petition in which she set out that "Fornells widow died in 1820; that the tract of land was always claimed by Rafael Andrews her son and legal heir as his property ever since." And the Board reported "Fornells having died said land descended to Andrews, who sold to claimant."

See 4th Amer. State Papers, p. 218 (Duff Green Ed.).

Appellee is not chargeable with the fraud committed by Mary Ann Davis and her husband, who was connected officially with the Board. If the suit could have been instituted before Waters Smith Davis had parted with his interest the proceedings before the Board would have been material upon the question of the equities.

The patent from the United States to Mary Ann Davis is in effect a release to her and to her heirs of the legal title to the tract of land surveyed as the private claim of Pedro Fornells. When the claim was confirmed the equitable estate was vested in the legal representatives of Pedro Fornells.

The proceedings before the Board of Land Commissioners are printed in full in Volume 4, American State Papers (Duff Green Edition), pages 161-218-275. By mistake the copy of these proceedings attached to the bill as Exhibit A was omitted from the printed transcript This Court is asked to read the same in the American State papers.

Appellants make no attack upon the deed by Raphael Andreu to Mary Ann Davis set out in the proceedings for confirmation of the grant as a conveyance of whatevr interest Andreu had in the grant. They do not seek

to go back of the deed to Sanchez from Antonia Porsila for an undivided one-half interest in the grant to Pedro Fornells.

That Mary Ann Davis took under the patent issued in 1898 the legal title as trustee can not be successfully denied.

It is established by the following statutes and decisions of this and other courts and rulings of the Land Department.

Acts of Congress of May 8, 1822 and February 8, 1827.

United States v. Perchman, 7 Pet. 51, text 98.

United States v. John Huertas, 8 Pet. 488.

Castro v. Hendricks, 23 How., text 422.

Martin v. United States, Hoffmans Reports 146, text 148.

United States v. Patterson, 15 How., text 12 and 13.

3 Am. State Papers (G. & S. Ed.) 450.

5 Am. State Papers (G. & S. Ed.) 376.

The equitable rights which originated before the date of the patent may be examined and enforced in equity.

Brush v. Ware, 15 Pet. 93, text 107.

Salmon v. Symonds, 30 Cal. 301, text 306-307.

"It matters not whether the presentation (for confirmation) was made by the confirmee in his own name in good faith, or with intent to defraud the actual owner of the claim. A court of equity will control the legal title in his hands so as to protect the just rights of others."

Estrada v. Murphy, 19 Cal. 248, text 272-274.

O'Connell v. Dougherty, 32 Cal. 458, text 462.

Wilson v. Castro, 31 Cal. 420, text 434-440.

Clark v. Lockwood, 21 Cal. 220-222.
Emerich v. Penniman, 26 Cal. 124.

Under the law the patent delivered in 1898 vested in the legal patentee the legal title in trust for the true owners under Pedro Fornells. As Judge Call correctly decided that as between the United States and the true owners under the Spanish Concession "it is from the issuance of the patent that the title became perfect in this case."

288 Fed., text 415.

The case then narrows down to this proposition: did the Court of Appeals err in sustaining the decree of the District Judge which dismissed the bill without requiring the defendant to answer?

The Circuit Court of Appeals held that the case stated in the bill did not entitle appellants to a decree; that upon the case stated it was too late to enter into the merits of appellants' "claim of title."

The Court however, made out "the case stated by the bill" upon the theory that Fornells held a perfect title at the cession of the Floridas; that the fee never passed to the United States; that the confirmation operated as a release of the interest of the United States without the issuance of a patent; that in considering the question of laches, the period of time involved extends over 73 years. Record p. 45.

The first assignment of error is *"The Court failed to understand the nature of the case made by the bill."*

We realize the seriousness of the charge made. It is based on the statement in the opinion: "The bill does not aver that Mary Ann Davis ever acknowledged or recognized that she held the title to a half interest in trust." Record page 45.

The Court then says that although the husband of Mary Ann Davis did not dispute "the claim" of Venancio Sanchez such admission if proved would not bind the estate of his wife after her decease.

There are four answers to this assertion:

First: The trust under which Waters Smith Davis held the legal title to the grant arose by operation of law when the patent was delivered in 1898. Mary Ann Davis died about 1885, long before the proceedings for the issuance of a patent were initiated by counsel for Venancio Sanchez.

Upon the statements of the bill as to title before the patent issued, from 1824 to 1843 Mary Ann Davis and Antonia Porsila held as tenants in common all the equitable estate granted by Spain to Pedro Fornells. After A. D. 1843 Venancio Sanchez was the owner of the undivided half interest conveyed to him by Antonia Porsila. From that date Mary Ann Davis (admitting as the bill does that she acquired an estate or interest by and under her deed from Raphael Andreu) and Venancio Sanchez as tenants in common held the equitable estate in the 175 acres of uplands confirmed to Mary Ann Davis, and the United States held the legal title.

Second: Under the laws of Florida the separate estate of a married woman is in the care and management of her husband.

Section 2589 General Statutes, Section 3948 Rev. Genl. Stats.

Third: After the patent issued in 1898 not only by the terms of the confirmatory act, but upon general equity principles Waters Smith Davis holding under his mother, Mary Ann Davis, held the legal title as trustee for the legal representatives of Pedro Fornells, the grantee from Spain. His mother's estate was bound by law, not by admissions.

It matters not whether Mary Ann Davis in her life time recognized the estate and interest held by her co-tenant under the grant from Spain. It was at most a mere equitable title. The admission of her husband, in whose care and management her estate was, establishes that she failed to assert and bring home to such tenant an intention to hold a full and complete equitable title, and failed to take and hold an exclusive occupancy of the grant under the confirmation by the United States—that she never did assert a title to the entire equitable estate, and never did put her co-tenant on notice. Had she claimed the entire equitable estate under her deed from Andreu of "all his right, title and interest" in the grant such claim imposed no duty on Sanchez. His estate was what his deed made it and the United States held in trust the legal title subject to his equitable title, whatever it might be, and subject to the equitable estate in Mary Ann Davis under her deed from Andreu, whatever that might be.

The admissions of either party were ineffective to create rights or interests though admissible in estoppel.

The bill alleges the lands are wild and unoccupied lands; that they remain as they were in 1827, "wild, unoccupied land, not in the actual occupancy of any person claiming title thereto."

Had Mary Ann Davis or her agent Water Smith Davis denied the estate held by Venancio Sanchez from 1843 to 1892 certainly counsel for Venancio Sanchez would not have advised her son at the latter date of his intention to procure the issuance of a patent, and inquired of him if his mother had deeded the interest she acquired from Raphael Andreu.

In 1892 counsel for Sanchez had a very imperfect knowledge of the law of Spanish grants. It is probable he contemplated the issuance of a patent to the then owners jointly under the provisions of the Act of 23d of January, 1832, which authorized the issuance of the patent

to the joint owners of confirmed private land claims in Florida, which law is yet unrepealed.

See re Lucy B. Abbott, 5 Land Decisions, page 677.

Fourth: In the affidavit made part of the bill and in paragraph 19 it is alleged that Waters Smith Davis, the grantor of defendant, at a date after he acquired the interests of his co-heirs (1893) and before the issuance of the patent, came to St. Augustine and proposed to sell his undivided interest to Venancio Sanchez or buy Sanchez' interest. Record page 25.

The motion to dismiss admitted this allegation of fact.

In its consideration of this allegation of the bill the Court again exhibits its failure to understand the case made by the bill.

Its opinion on page 45 of the record says "The averment that Waters S. Davis offered to sell to Venancio Sanchez or to buy from him * * * is not sufficient to support the inference that he acknowledged or recognized that he held any part of the title as trustee."

When this admission was made he did not stand in a trust relation to Sanchez. The United States was yet trustee for all the equitable owners.

The bill alleges that *shortly prior to the issuance of the patent* said Waters Smith Davis in the store of Venancio Sanchez did admit and recognize the rights of Sanchez in the 175 acres on Key Biscayne, as his cotenant. Record p. 25, record p. 9.

This interview between Davis and Sanchez took place prior to the issuance of the patent and "thereafter failing to sell his undivided interest to Sanchez, * * * said Waters Smith Davis, on to-wit, August 10, 1893, applied for a patent," etc. Record p. 10.

The admission of Davis made to Sanchez after he had been invited by Sanchez' counsel to join in applying for

a patent, and before he applied for the issue of the patent he obtained five years after, estops him and appellee claiming under him from denying appellants' estate under the patent.

The statement in the opinion that Venancio Sanchez purchased "his adverse claim which if valid he should have established while the witnesses who knew about it were living," is entitled to slight consideration in the face of this admitted fact. Such admitted fact rebuts the further statement in the opinion that "the long delay and death of material witnesses appear on the face of the bill and if they constitute laches the bill may be dismissed without requiring an answer." Record page 46.

## THE CASE DECIDED IS NOT THE CASE MADE BY THE BILL.

The Court treats the case as if the confirmation of the grant to Fornells upon the petition of Mary Ann Davis established a trust, and imposed a present duty upon Fornells' legal representatives other than Marcus Andreu to take action to assert against the confirmee their equitable rights; that their long delay to proceed has resulted in the loss of evidence by the death of witnesses; that "the hour glass must supply the ravages of the scythe."

There is nothing in the bill to sustain such a disposition of the case. There are no deceased witnesses whose testimony would be material in support of the title of appellee or that of his grantor. The bill alleges that in a certain state of the law Rafael Andreu who deeded his interest to Mary Ann Davis, and his half sister, Antonia Porsila, who deeded an undivided half interest in the grant, were tenants in common from the death of their mother. The lands were unsurveyed until 1847. At that date Mary Ann Davis and Venancio Sanchez were tenants in common, and about that time Mary Ann Davis' husband was negotiating with Sanchez to settle the Key.

The bill seeks a decree declaring the legal title in appellants for a one-half interest in the 175 acres described in the patent, and a half interest in the submerged lands granted by the State in 1856 to the then equitable owners of the uplands. The title to the submerged land is from the State of Florida and began in A. D. 1856. It is wholly independent of the title confirmed to Mary Ann Davis.

Complainants are greatly prejudiced by the death of Venancio Sanchez, whose testimony would sustain the allegations of the bill, especially the statement that after he acquired the interests of his co-heirs and before the issuance of the patent Waters Smith Davis came to St. Augustine from Texas and offered Mr. Sanchez to buy or sell.

It does not appear on the face of the bill, nor is it a fact that appellee is prejudiced by the death of any witness. Davis' father might, if living, deny that he and Sanchez planned to settle the Key, but we cannot assume he would deny it. Mr. Davis is living and doubtless will be a witness in the case.

Complainant's case is practically the case made in Wilson vs. Castro, 31 Cal. 420. We specially call this Court's attention to that case. In that case as in the case at bar, the decree of the lower court was made upon demurrer to the bill. The confirmation of the Mexican grant was upon petition of a third party as in the case at bar. The Court there says, text page 432: "The real issues tendered by the complainants are—Did Antonio Belona have a property interest in the rancho which upon his death descended to his brother and sister, and which was afterwards acquired by the plaintiffs? And do the defendants hold the legal title thereto in trust for the plaintiffs?"

The Court held the proceedings for confirmation were not of necessity adverse to the rights and interests of the heirs of the grantee under Mexico, and even if

they were intended to be so, could not operate to create an equitable estoppel upon such heirs at law.

The case meets and answers the contentions made in the two lower courts by counsel for appellee and sustains the first and second assignments of error on this appeal.

The third, fourth and fifth assignments of error will be found to be sustained by the statutes found in the argument made upon the case of Wilson Cypress Company vs. Marcos.

*THE COURT ERRED IN HOLDING THAT UPON THE MATERIAL ALLEGATIONS OF FACT MADE BY THE BILL IN DEFINITE TERMS, ADMITTED BY THE MOTION TO DISMISS, THE DEFENSE OF BONA FIDE PURCHASER, AND LACHES OF COMPLAINANTS COULD BE MADE BY MOTION TO DISMISS.*

Does appellee occupy the position of a bona fide purchaser for value *without notice?* May he make this defense by motion to dismiss?

Mr. Justice Field speaking for the Court in Teall v. Schroeder, 158 U. S. text 178, says "As the Complainants and all other parties interested could have obtained the necessary knowledge upon those subjects by proper inquiries they are charged with such knowledge from the time those conveyances were placed on record, and held to all the consequences following this acquisition."

Oliver v. Piatt, 3 How., text 410.

The rule laid down in 2 Pomeroy Eq. Jur. Sec. 745 is "The essential elements which constitute a bona fide purchaser are therefore three—a valuable consideration, the absence of notice, and presence of good faith."

While two of these essential elements may be found in this case the absence of notice is lacking.

In the case at bar the legal title was direct from the United States to Davis by the patent and all the proceedings in the General Land Office gave appellee notice of Sanchez half interest, and Sanchez deeds of record afforded notice of a late date. The deed from Venancio Sanchez to his brother's children, appellants other than William J. Sanchez, was recorded in Dade County, 17 June, 1895, three years before the patent was delivered. Record page 37.

DEFENSE MUST BE SET UP BY PLEA OR ANSWER

But if in law appellee does "occupy the position of a bona fide purchaser" he must make his defense by plea or answer.

"Whether this is such a case as will give Chiles the protection he claims (as a bona fide purchaser) depends on the rules which courts of equity have adopted as to bona fide purchasers for a valuable consideration without notice."

Boone v. Chiles, 10 Peters 177, text 210.

He must plead himself a purchaser without notice

Bodmen v. Vandenbendy, 1 Vern 179. Also the cases cited in 10 Peters, text 212.

It is only when the fact is clearly shown by the bill that resort to a demurrer may be used to avail of the defense of bona fide purchaser.

2 Pomeroy Eq. Jur. Sec. 784.

A defendant cannot set up the defense of being a bona fide purchaser for value orally at the hearing; such defense should be pleaded formally or set up by way of answer.

Story Eq. Jur. Sec. 805a.

The learned District Judge was in error in holding the bill should be dismissed without the defense being made by answer. The Circuit Court of Appeals was asked to determine and announce the practice to be followed where "the bill sets forth what were the impediments to an earlier prosecution of the claim." Badger v. Badger, 2 Wall, text 95.

This the Court failed to do. The controlling impediment to an earlier prosecution of the suit received in its opinion this slight notice, "Appellants * * * set out as excuses * * * their inability to trace the relationship between Antonia Porsila and Rafael Andreu until discovery in 1919 of an Index to the Spanish Archives * * * the Index would only have furnished information already possessed by Venancio Sanchez at the time he purchased 'the claim' now sought to be enforced."

The opinion does not fairly state the facts set out in the bill. Venancio Sanchez did not purchase an adverse claim. He acquired by deed the undivided one-half interest in the grant of 175 acres to Fornells, the legal title to which remained in the United States until 1898.

The Index furnished information of the existence of church records which will now enable these complainants to establish by ancient documentary evidence the marriage of Fornells and the mother of Andreu, the birth of Antonia Porsila, and the death intestate of Fornells, the fact that Fornells' widow was at her death Mariana Tudorina, who died testate and whose will is in the Spanish archives.

The Court's statement that the Index to the Spanish Archives "would only have furnished information already possessed by Venancio Sanchez at the time he purchased 'the claim' now sought to be enforced" has been proved to be unwarranted by the contents of that Index since it was discovered. Sanchez or his attorney could not have been possessed of the imagination to have conceived that the widow of Andreu, afterwards widow of

Fornells, had the name Mariana Tudorina, and so have found and examined her will in the Spanish form and language, and thus show in a court of equity that they hold a beneficial interest under the United States patent.

The information possessed by Mr. Sanchez in 1843 when he took and recorded his deed to an undivided half interest in the grant was that his grantor was a sister (half sister) of Rafael Andreu, who had deeded his interest to Mary Ann Davis. Neither Venancio Sanchez nor Mary Ann Davis and her husband, William G. Davis, who had been associated with the Board of Land Commissioners that confirmed the grant to Fornells, deemed a patent from the United States necessary. Both the equitable owners treated the lands as their joint property and took proceedings to make it the principal town which Key West came to be. Mr. Sanchez's deed was spread on the public records, and his ownership recognized by the husband of Mary Ann Davis, in whose care and management was her property. It was not until Mr. Sanchez brought the matter of his ownership to the attention of appellants' counsel in 1892 that either party took action to procure a patent from the United States. For nearly fifty years both parties had been content with their equitable titles. Counsel for Venancio Sanchez initiated the proceedings, and invited the heirs of Mary Ann Davis to join with Mr. Sanchez in obtaining a patent for the 175 acres of upland they held in common. Only then was Waters Smith Davis aroused to action. He first acquired the interests of his co-heirs, visited St. Augustine in expectation of acquiring Mr. Sanchez's half interest, and then applied for issuance of a patent by the United States.

Until the patent issued Mr. Sanchez had no grounds to bring suit. The equitable title rested in the legal representativs of Pedro Fornells, he holding a half interest and as he supposed and admitted Mary Ann Davis while living holding the other half interest. The United States

held the legal title from the cession until delivery of the patent in 1898.

After the legal title was vested in Waters Smith Davis under his deed from his co-heirs of Mary Ann Davis, the right to sue for a transfer of Sanchez's estate in such legal title first accrued. He then was not required to bring an action. He could rest on his equitable estate in the patented lands and his legal estate in the submerged lands so long as no claim of exclusive right was brought home to him by his co-tenant. The patentee held the estate which the law imposed upon him, though held invito domino.

Where plaintiff has a legal right to delay failure to sue is not fatal.

Demuth v. Old Town Bank, 85 Md. 315, 60 Am. St. Rep. 328.

The admitted allegation of the bill is that from 1824 to the date the bill was filed the lands have remained as left by nature, not in the occupancy of any person claiming title thereto.

Laches will not be imputed to one in peaceable possession of land under an equitable title for delay in resorting to a court of equity for protection against the legal title.

Hays v. Carroll, 74 Minn. 134, text 139; 2 Pomeroy Eq. Jur. Sec. 817.

Where a continuing right to invoke the aid of a court of equity exists, it may be asserted at any time.

Dosar v. Hammell, 89 Okl. 152, 214 p. 718.

Miner v. Beekman, 50 N. Y., text 343.

Cooper v. Rhea, 82 Kan. 109, 29 L. R. A. (N. S.) 930, 136 A. S. R. 100, 20 Am. Cas. 42.

*ON THESE ADMITTED FACTS SET FORTH IN THE BILL, AND FAIRLY DEDUCED FROM THE FACTS SET FORTH AS AN EXCUSE FOR NOT EARLIER BRINGING SUIT, DO THE RULES PRESCRIBED FOR THE COURTS OF EQUITY AUTHORIZE A DISMISSAL OF COMPLAINANTS' BILL ON MOTION?*

Such is not the practice.

It is only when the case of plaintiff as stated in his bill will not entitle him to a decree that the judgment of the Court whether the defendant shall answer may be required by demurrer.

Hovenden v. Lord Annesley, 2 Sch. & Lef. 607.
Badger v. Badger, 2 Wall 87, text 95.
Lonsdale v. Smith, 106 U. S. 391, text 393.

Where the Court is not sure the plaintiff is guilty of laches, an inquiry will be ordered.

Pickering v. Stamford, 2 Ves. Jr. 272.
Chalmer v. Bradley, 1 Jac. and Walk. 63.

PRACTICE UNDER RULE 29

The error committed by the learned District Judge was in sustaining appellee's motion to dismiss the bill on the ground of laches, which error should have been corrected by the Court of Appeals.

The argument may be divided into two branches:

(a) The practice under Rule 29.

(b) Whether under the facts of this case as set out in the bill the motion to dismiss should have been granted.

Rule 29 was taken from the English Orders and Rules of Court adopted in 1883. It is Order 25 and reads —"No demurrer shall be allowed."

As construed by the court in England, proceedings under this order take the place of demurrers in the sense that the court is enabled when it sees no reasonable ground of action or defense, to put an end to the action or defense. It is not bound to regard the case with the same strictness as under the old practice on demurrer, the court having now more regard to the reasonableness or unreasonableness of the claim or defense.

Dadswell v. Jacobs, 34 Ch. D. 278.
Burstall v. Beyfus, 26 Ch. D. 35.

"Every defense in point of law arising on the face of the bill * * * shall be made by motion or in the answer."

But the rule prescribes "Every defense heretofore presentable by plea in bar or abatement shall be made in the answer."

Rule 29, and cases cited in Dewhurst's Rules, 2 edition, pages 495-500.

Objection arising out of length of time can be taken by demurrer only when the bill so states the plaintiff's case that there is nothing to interfere with the lapse of time.

Hodle v. Healey, 1 Ves. & Bea., 539.

Appellee's motion to dismiss operated to admit the allegations of the bill.

Baltimore & Ohio R. Co. v. United States—U. S.—decided March 3d, 1924.

Stromberg Motor Devices Co. v. Holley Bros. Co., 260 Fed. 220-222 and cases cited.

First National Bank v. Durr, 246 Fed. 163.

Forbes v. Wilson, 243 Fed. 264.

Lowenthal v. Georgia C. & P. R. Co., 233 Fed 1010-1014.

Williams v. Mason, 289 Fed. 812-814.

Motion to dismiss must be denied unless the motion clearly discloses that on the allegations of the bill taken as true it must be dismissed on final hearing for want of equity.

Commodore's Point Terminal Co. v. Hudnal, 283 Fed. 150-163.

Where it appears on the facts and circumstances disclosed in the bill that justice can be better secured by leaving the merits of the case to be disposed of after the coming in of the answer the bill will not be dismissed on motion.

O'Keefee v. New Orleans, 273 Fed. 560-561.

Loughran v. Quaker City, etc. Co., 281 Fed. 186-188.

Such a practice protects against a hasty adjudication on a summary proceeding.

Ralston Steel Co. v. Nat'l Dump Car Co., 222 Fed. 590.

Wright v. Barnard, 233 Fed. 329-330.

This suit was brought within seven years from the time appellee took his deed from Davis, trustee under the patent from the United States by operation of law.

Where length of time will not bar the right to bring ejectment then it shall not bar the right to bring a bill in equity.

Cook v. Arnham, 3 P. Wms. 287.

THE COURT ERRED IN FINDING THAT THE BILL ON ITS FACE SHOWED SUCH LONG DELAY AS TO CONSTITUTE LACHES. SEVENTH ASSIGNMENT OF ERROR.

Does the bill on its face state a case which does not entitle appellants to a decree?

Where the right to relief is clear and definite but has not been asserted because after diligent effort the party could not obtain sufficient information of existing documentary evidence to maintain an action, it is not a stale demand if asserted within a reasonable time after the necessary information is obtained.

Appellants met the anticipated defense of staleness of their demand by allegations in the bill showing their inability to apply to a court for relief with any expectation of success between the date when the patent issued and the date the bill was filed. This required the defense of laches to be made by plea or answer.

Ganton v. Carroll, 101 U. S. 426, text 429.
Hays v. Seattle, 251 U. S. 233, text 239.

See statement of Lord Eldon in Foster v. Hodgson, 19 Ves., text 184.

In view of the voluntary action of Waters Smith Davis in applying for and obtaining the patent to issue in the name of Mary Ann Davis when by the Act of 23 of January, 1832, it might issue in the names of the real owners Venancio Sanchez and himself, did he not take and hold the legal title as an express trust? If he did, then no length of time is a bar to its enforcement.

New Orleans vs. Warner, 175 U. S. 120, text 130.

The question to be determined on this appeal is whether or not the failure to bring suit before Davis

parted with his legal title excused by the facts set out in the bill and admitted by the motion to dismiss clearly establishes that upon final hearing the bill should be dismissed.

The bill alleges that the common title is under the grant to Pedro Fornells that the patentee's claim of title is under a deed of Rafael Andreu of "all our right, title and interest" in the tract granted by Governor White, with warranty against themselves; that in 1843 Antonio Porsilla (widow of Barrosa) conveyed to Venancio Sanchez the undivided one-half of the grant, which deed was promptly recorded in the county where the land lay, as also in St. Johns County, where was recorded the deed from Andreu to Davis,—record Page 7; that Sanchez was advised that his grantor was the sister of Rafael Andreu; that prior to issuance of the patent he made diligent efforts to find Antonia Barrosa, or any of her descendants while his right to an undivided half of the grant was undisputed—to get legal evidence to prove her relationship to Rafael Andreu; that his efforts were extended, exhaustive and persistent; that he inquired at the College of Notaries at Havana and from the descendants of Andreu; that he diligently and persistently sought in the church records in Havana and St Augustine for proof to establish Antonia Barrosa to be the sister of Rafael Andreu; that he had no clue and after long and persistent efforts could get no clue to lead him to the record proof to establish that his grantor and Davis' grantor were brother and sister; that this inability to get record proof to connect his grantor and Davis' grantor with a common ancestor or common right continued until July, 1919, when there fell into the hands of his counsel Alvarez Index to the Spanish Archives, supposed not to be extant; that these archives searched, revealed that there had existed before the change of flags, written instruments in the Spanish language of testamentary proceedings on the Estate of one Mariana Tudorina, which showed her to

be the widow of Pedro Fornells, the mother of Antonia Porsila de Barrosa under whom Mr. Sanchez holds a half interest in the patented lands and to be the mother of Rafael Andreu, who quit-claimed his interest in the patented land to Davis' mother; that promptly on getting this clue informing counsel of Sanchez where to look for proof of the relationship of the respective grantors of Sanchez and Davis, search was made, and it was then first found that written documents existed which establish the extent and interest of Sanchez and Davis under a common title to the 175 acres described in the patent issued to Mary Ann Davis; that from before the date of the patent until his death in 1899 Sanchez never desisted from his efforts to make proof to establish the relationship between his grantor and the grantor of Davis; that without intermission a persistent search for such proof was kept up; that it was only after the discovery revealed by Alvarez Index in July, 1919, and by such discovery that appellants were and are able to produce legal evidence that upon the death of the widow of Fornells the grant made to him descended to the mother of Andreu and her daughter, if by the civil law such was the course of descent upon the death of the husband and father intestate.

This Court, we are confident, will hold that having admitted the foregoing alleged facts to be true it is clear that on the face of their bill appellants are not barred of the relief prayed.

## IF AN ACTION WAS CERTAIN TO FAIL FOR WANT OF EXISTING DOCUMENTARY EVIDENCE, IS IT A PRESUMPTION OF ACQUIESCENCE THAT NO ACTION WAS BEGUN WHILE SUCH CONDITION CONTINUED?

On the facts alleged was Venancio Sanchez before he died in 1899 bound to sue Waters Smith Davis, who

obtained the patent in 1898 after advised by counsel it was a certainty such suit would fail for lack of documentary evidence to establish the co-heirship of his grantor with Andreu under whom Davis had acquired the legal title by United States patent?

Were appellants still under the same disability required to bring a suit which must fail for a like reason?

It is a fact that after Alvarez Index to the Spanish Archives fell into the hands of counsel and after this suit was brought, the bundles of the archives relating to Fornell's estate could not be found. They were not in custody of the State of Florida and the Land and State Departments of the government could furnish no information of their disposition or whereabouts. See letter 1027650 "K" D. C. February 17, 1922—Florida Archives—from Commissioner Spry to Senator Fletcher.

Only since the record in this case has been filed here has counsel discovered that these portions of the Archives are in the Library of Congress.

The motion to dismiss admits that the testamentary proceedings in the estate of Mariana Tudorina, the widow of Pedro Fornells, mother of Antonia Porsila, under whom appellants claim are shown by Alvarez's Index to be in these archives, and further admits the fact alleged that only after counsel's discovery of the Index to the Spanish Archives and because of such discovery could appellants produce the documentary evidence ncessary to sustain a suit to maintain their title to the lands described in the patent delivered to Mr. Davis, covering the lands jointly owned by appllants and Waters Smith Davis from 1895 to 1913, and thereafter by appellants and appellee.

The fullest knowledge with entire but mere acquiescence can not bind a party who has no means of resistance.

The Court takes judicial notice these Archives are in the Spanish language. The records in the Florida cases for confirmation of private claims establish that they

consist of loose papers filed away in bundles. Without an index their contents are practically inaccessible. Counsel has lately learned that the present custodian realizing this, has begun to assemble the papers by subjects.

The plaintiff must have slept upon his rights and show no excuse for his laches in asserting them to be guilty of laches.

Speidel v. Henrici, 120 U. S. 377, text 387.

Lapse of time is permitted in equity to defeat an acknowledged right only on the ground of its affording evidence of presumption that such right has been abandoned; it never prevails when the presumption is outweighed by opposing facts and circumstances.

Lloyd v. Simons, 97 Minn. 315, text 317.

In a case where the chancellor said, "I do not see that the plaintiffs did not have the same means of gaining information before, that they had at the time of filing their bill," he yet held that lapse of time imputed to laches may be excused by the obscurity of the transaction where the plaintiff was disabled from obtaining full "information of his rights."

Muney v. Palmer, 2 Sch. and Lefs 474, text 487.

What is the difference in legal effect between inability to obtain information of one's rights, and inability to obtain documentary evidence necessary to maintain an action to enforce such right?

In the Court below, counsel for appellee contended that the law is that the excuses for laches presented by the bill cannot avail appellants because appellee is in no way chargeable or connected with the facts and circumstances which prevented Venancio Sanchez and appellants from applying to a court to determine their equitable rights under the patent.

We ask this Court to consider and decide this question of law. Our contention is that the principles upon which Courts of Equity act, require this Court to hold that equitable owners, shown not to have acquiesced in a claim of absolute ownership (if such claim be made) by a trustee holding the legal title to land—not shown to have been ousted from possession of lands held for their benefit by such trustee, who present facts showing that they have been precluded from maintaining with any expectation of success an action to establish by court decree their equitable title, who later discover the documentary evidence which indisputably establishes their equitable rights where there has been no material change in the property are not barred by laches, if they proceed promptly after such discovery to assert their equitable rights. We ask this Court to consider the reason of the rule under which Courts of Equity proceed. The growth of the law is by the application of established rules to new facts and circumstances.

On their statement of the facts have appellants left undone any act required? Does it appear they or Venancio Sanchez were bound to presume that Davis acquired the interests of his co-heirs under his mother and sought for and obtained a patent for the lands granted Fornells with the intention to claim title to the entire tract, under Rafael Andreu's deed of his interest in the grant?

As to Davis, appellee's grantor, do the facts set out show or authorize the Court to find that by the lapse of time there was any change of his situation? The law made him trustee for all the beneficiaries under the patent. Do the circumstances of this case as set out relieve him of his obligation to respect the rights of his cotenants?

Upon the facts alleged in the bill he did recognize those rights until 1913, when, unknown to appellants, he conveyed the whole grant to appellee.

Appellee stood in Davis' shoes, when with notice of the character of Davis' title he took his deed.

Until Davis conveyed the whole 175 acres to appellee, Davis and appellants were tenants in common of 175 acres of unoccupied wild land.

The opinion of the learned District Judge assumes Sanchez had been ousted from the grant by Davis.

Ouster is a question of fact which involves the intention and motives of the parties in possession.

Beal v. McNenemy, 63 Neb. 70, 93 Am. St. Rep. 427, citing cases.

If appellee's possession did operate as a disseisin of his co-tenants he has not had exclusive possession as a claimant in severalty long enough to ripen into title, or bar appellants' right to the property, even by the terms of the Florida Statute of Limitations prescribed for actions at law, which is seven years.

Section 1718 General Statutes; Section 2932 Revised Genl. Statutes.

Shannon v. Lamb, 126 N. C. 38, 35 S. E. 232.

Thorpe v. Holcomb, 126 N. C., 35 S. E. 608.

The Common Law is in force in Florida except as charged by statute, which is silent as to when trust estates are barred.

How does appellee's possession for less than the period required to bar an action to recover land bar this equitable action to decree appellee to hold the legal title acquired from Davis in trust?

Do the facts set out in the bill as an excuse for not asking for a partition of the grant or for a decree declaring Davis to hold the legal title vested by the patent as trustee for the true owners show neglectful repose by appellants, or by Venancio Sanchez?

Under the law the patentee held the legal title as trustee *in invitum*. Appellants were never required to

obtain a decree declaring the trust. It arose by operation of law and continued until Davis conveyed to appellee.

Davis' paper title was only for the interest of Rafael Andreu. The Commissioners confirmed only that title which Mary Ann Davis proved before them.

Appellants not being barred at law of the right to assert against appellee an interest in the patented lands, there can be no laches in proceeding in equity within the same time.

Kelly v. Boettcher, 85 Fed., text 62.

Boatsh v. Boysen, 175 Fed., text 708 and cases cited p. 707.

Wilson v. Plutus Mining Co., 174 Fed., text 320 and cases cited.

If Davis ever had any possession of the land such possession was limited by the extent of his paper title to the interest conveyed by Andreu, and was not in hostility to the equitable rights of Sanchez. The law will not presume an intention to defraud. In the absence of anything to the contrary Davis is presumed to have entered under a claim of Andreu's interest.

Turner v. Sawyer, 150 U. S. 578, text 586.

Reynolds v. Sumner, 126 Ill. 71, 9 Am. St. Rep. 528, 1 L. R. A. 330.

Jones v. Dyer, 109 Am. St. Reps. 603 and notes pages 611-618-623.

The bill alleges and the motion to dismiss admits there never has been any enclosure of the lands, and from the change of flags they have remained unoccupied, wild lands.

SANCHEZ' RIGHTS NEVER ABANDONED

The admitted allegations of the bill show there has been no neglect on the part of appellants or Venancio Sanchez.

In Pond Creek Coal Co. v. Hatfield, 239 Fed. 622, Judge Knappen has set out by citations from opinions of the Supreme Court the rule of law to be applied in the case at bar.

We adopt as part of this brief the several statements of the law as printed on pages 628 and 629 and ask this Court to be guided thereby in its decision in this case. The facts in the Pond Creek Coal Co. case are not materially different in principle from the case at bar.

In that case it is said, page 630, that plaintiff had no occasion to examine the public records for any claim on the part of defendant; that plaintiff had no knowledge of defendant's claim until shortly before the bill was filed.

In the case at bar appellants had no occasion to examine the public records to learn if Davis had made a transfer of his interest as tenant in common or of his legal title to the whole tract, and no knowledge that he had done so until shortly before the bill was filed.

Record only operates as notice to those who are compelled to search the records to protect their own interests. 2 Pomeroy Eq. Jur., Sec. 657. See cases cited under note 2, especially 1 Sand ch. 419.

The Florida statute for recording deeds, etc., is approximately like the Virginia statute. Of that statute it is said in McCormack v. James, 36 Fed., text 18-19:

"The very object of the legislature in enacting the statute was to give the purchaser or other person dealing with the property notice of any incumbrance thereon.

* * So complete are the requirements for the registration of all matters touching the titles to land, so easy of access is the knowledge where and how it can be attained, that in the language of a distinguished law writer 'for one to be deceived argues a general negligence so gross as to exclude sympathy for the sufferer.'" 2 Minor Inst. 988.

Under the recording statute it was necessary for appellee to search back to the primary title in Davis.

This disclosed the patent upon confirmation of the grant to Pedro Fornells—the confirmation proceedings were a link in the chain of title and disclosed that Mary Ann Davis got her title from Rafael Andreu, and the conveyance was of his right, title and interest only.

Appellee knew or was bound to know that the patent was a deed of trust, at most a mere quit claim from the United States, and the patentee was trustee for the equitable owners whoever they might be. He therefore was required to learn what the records of the General Land Office showed.

Great Northern Ry. Co. v. Steike, 261 U. S., text 131-132.

A purchaser can not plead no notice if he abstained from calling for information to which he is entitled by law.

Parker v. White, 2 N. R. 157, 1 Hem. & M. 167.

Sanchez was not required to take notice of the deed of the three acres by the United States to Davis. The recording statute applies only to successive purchasers from the same seller.

Gillig v. Maass, 28 N. Y. 191.
Purdy v. Huntington, 42 N. Y. 334-347.

Venancio Sanchez and appellants were not required to search the public records or keep track of their trustee to see that he did not convey the legal title vested in him by the patent.

The change of circumstances which appellee may set up by answer as a defense to this suit is that appellants' failure to bring an action against Davis, to have him convey to them the one-half of the land described in the patent to the confirmee of the grant to Fornells has allowed him to pay Davis for 175 acres instead of half that area, and to pay taxes on the whole tract since 1913.

When that defense is properly presented appellants must meet it.

It will then be found that appellants' rights were continuing, inherent in them under the law governing patents issued for confirmed Spanish grants, and might be asserted at any time.

Reorganized Church, etc., v. Church of Christ, 60 Fed. 937, text 956.

Orthwein v. Thomas, 11 Am. St. Rep. 159, text 169.

Simmons Creek Coal Co. v. Doran, 142 U. S. 417, text 450.

Southern Pac. R. Co. v. Stanley, 49 Fed. 263, text 266.

Miner v. Beekman, 50 N. Y. 337, text 343.

Sharon v. Tucker, 144 U. S. 533.

In the last cited case the suit was brought in 1890 upon a title acquired in 1840. The Court gave a decree that complainant's title resting on the recollection of witnesses be declared to be complete and the defendant be enjoined from asserting title.

Unless it appears on the face of the bill that such a defense must prevail after evidence taken the bill may not be dismissed on motion.

One of the facts which defendant would be required to prove is loss of material evidence because of appel-

lants' delay to sue Davis. In this case the lapse of time has made it difficult for appellants to make out their case. It has in no way affected the defense, since all facts to be proved by appellee happened after the patent was applied for. Until that date both Davis senior and Sanchez had rested upon their respective deeds of conveyance, and the Statute under which the grant to Fornells had been confirmed. Neither the recorded deeds nor the Statute are affected by lapse of time.

As to the taxes paid since 1913 and as to the purchase money paid Davis by appellee the District Court has full power to make a decree which will do equity, hence on the face of the bill it does not appear appellants' bill must be dismissed on final hearing.

### THE TRUST NEVER DENIED

The bill alleges that Waters Smith Davis, appellee's grantor, never expressly denied the trust. Where a trustee has denied the trust for more than 20 years, if the cestui que trust is under disability the statute will not begin to run until the disability is removed. Here the trust relationship arose less than 15 years before the bill was filed.

In a court of equity such disability is not confined to nonage or lunacy; any disability that wholly disables a party from asserting in a court his rights is as much a disability as those given exemption in statutes of limitation governing actions at law. This is shown by the rule that no time will protect a fraud so long as it could not have been discovered by ordinary diligence, but as soon as the fraud is known the statute begins to run. Before the discovery the party is under disability; after the discovery the disability is removed. So in the cases above cited where delay is due to failure of the Land Department to issue a patent.

Even if the disability under which Venancio Sanchez labored between 1895 and 1899 and under which these appellants have labored until the discovery of Alvarez Index is not sufficient to excuse failure to bring suit at an earlier day appellee can not admit on the record all the facts which establish that:

(a) Appellants never abandoned their rights.

(b) Had never had an opportunity to procure existing documentary evidence to establish their rights;

(c) Did not learn that their trustee had conveyed their estate until shortly before suit brought

and ask the Court without proof, upon the mere lapse of time, to determine that appellants have not in their bill stated a cause of action maintainable in equity.

If the rule be that in every cause where the defense of laches is set up its application depends upon the circumstances of the particular case, the onus of showing that the plaintiff neglected to do something the law bound him to do amounting to long continued acquiescence is on the defendant; surely he can not admit the plaintiff's statement of facts which explain away the delay to commence suit, and urge laches as a matter of law.

Lapse of time in equity is permitted to defeat an acknowledged right only on the ground of raising a presumption that the right has been abandoned, and this presumption will never prevail against opposing facts and circumstances outweighing it.

Wood on Limitations, p. 125, Sec. 60, Chap. 6.

Within what time a constructive trust will be barred must depend upon the circumstances of the case and these are always examinable.

Mishoud v. Girod, 4 How. 503, text 561.
Oliver v. Piatt, 3 How., text 411.

Hence the defense of laches can not be set up by demurrer, nor by motion to dismiss.

Laches is a neglect to do something that by law a man is obliged, or in duty bound to do.

The essence of laches is not merely the lapse of time. It is essential that there be also acquiescence in the alleged wrong or lack of diligence in seeking a remedy.

Mr. Justice Brandies in So. Pacific Co. v. Bogert, 250 U. S., text 488-489.

In that case 22 years had elapsed before suit.

The rule is well stated by Judge Morrow in these terms.

No hard and fast rule has been laid down by the courts which can be said to govern all cases wherein the defense of laches is involved. The lapse of time which might induce the application of the doctrine is not a determined period, but depends upon the circumstances of the particular case. One principle pervades all cases involving the defense of laches, however, and that is, that not only must there be a seemingly *unnecessary* delay on the part of the plaintiff in bringing or *prosecuting* his action, but that, by reason of some change in the condition or relation of the property or parties occurring during the period of delay, it would be inequitable to permit the claim of plaintiff to be enforced.

London & San Francisco Bank v. Dexter Horton & Co., 126 Fed., text 601 citing cases.

It may well be questioned whether Venancio Sanchez was under any obligation to seek the aid of a court. The confirmation of the grant to Fornells inured to the benefit of the parties really interested both at law and in equity, and not merely to the benefit of Mary Ann Davis, the confirmee. This issuance of the patent by statute,

did not affect the interest of third parties. Their equities are reserved. The bare legal title was transferred by the patent to Mary Ann Davis.

Knight v. United States Land Co., 142 U. S., 161, 35 L. ed. 984.

Carpenter v. Montgomery, 13 Wall 480, text 495, 20 L. ed. 701.

The title taken and held by Davis operated primarily to the benefit of the heirs of Mary Ann Davis so far as the legal title was concerned; "But this in no wise operated to bar the parties beneficially concerned, and in justice and equity entitled to the possession and consequent ownership of the property of the remedies and relief they seek."

Garland v. Wynn, 20 How. 6, text 8.
Wilson v. Castro, 31 Cal. 420.
Salmon v. Symons, 30 Cal. 301 citing.
Estrada v. Murphy, 19 Cal. 272-274.
Clark v. Lookwood, 21 Cal. 220.
Emerish v. Penniman, 26 Cal. 124.

Under the patent Sanchez held a continuing right that he might assert at any time—equally as potent 15 years after the patent issued as at any time during the first seven years. All the beneficiaries under the grant from Spain were entitled to possession of the confirmed grant.

Davis' possession was Sanchez' possession.

Davis might have continued to claim the whole 175 acres under the patent to the end of the world, without injury to appellants so long as he did not transfer to a third party a greater estate than the patent vested him with, and failed to take and hold any occupancy or enclosure of the premises.

He did attempt to convey the whole 175 acres to appellee but appellee took with notice of appellants' interest and appellants have proceeded to have their estate decreed within seven years from the time appellee took his deed. True there has been delay, but not undue, unreasonable nor unexplained; hence there has been no laches.

PAYMENT OF PURCHASE PRICE WAS WITH NOTICE

It was urged in argument that Deering's equity was superior to appellants' because he had paid Davis the purchase price. "If a person will purchase with notice of another's right, his giving a consideration will not avail him. for he throws away his money voluntarily, and of his own free will."

Lord Chancellor Hardwick in Mead v. Ld. Orrery 3 Atk., text 238.

Appellee bought with constructive notice of the contest against delivery of the patent to Davis in the General Land Office and the recorded deeds.

(a) From Antonia Barrosa to Venancio Sanchez.
(b) From Venancio Sanchez to E. C. F. Sanchez et al.

The opinion of the trial Judge in this case, 288 Fed., text 416, says Venancio Sanchez "was charged with notice that in 1893 the grantor of defendant had received a conveyance of the three acres theretofore conveyed to the United States by his predecessor in title."

This conveyance of three acres to Davis was made in 1903. Mr. Sanchez died in 1899.

The principle of constructive notice under the recording statute urged to sustain the decree is fatal to appellee.

If appellants were charged with constructive notice of Davis' deed to appellee spread on the records, why was not appellee charged with notice of the deed from Antonia Barrosa to Venancio Sanchez and the deed from Venancio Sanchez to his brother's children?

We are advised that the fact is these deeds were not in the abstract of title furnished appellee for the reason that the abstractor did not know the description of the property therein in the Spanish words "Cayo Byscano" effected the property described as Key Byscane which Davis offered to sell appellee. Appellee has a case against the abstract company, but we contend the learned trial judge erred in finding he "occupies the position of a bona fide purchaser for value."

And further contend if such be his position he must make his defense by answer.

If and when appellee shall make the defense of laches according to the practice prescribed by the rules in Equity the trial court will apply the applicable principles, one of which is that in continuing trusts that are enforceable in a court of equity only, no length of time will bar the rights of the cestui que trust as against the trustee so long as the relation of trustee and cestui que trust continues, unless there be an open denial of the trust brought home to the cestui which requires him to act as upon an asserted adverse title.

When the facts alleged in the bill have been supported by testimony and documentary proofs, applying those principles to the facts of this case and appellants are found not entitled to the aid of a court of equity, they must submit to the loss of their valuable property. What they now ask of this Court is that the rules of practice as construed in the cited cases be applied to their case.

They ask this court to find there was error in denying them relief without a hearing on the merits upon

motion by which appellee has admitted they acted with all the despatch possible, against a party who with constructive notice of their rights acquired the legal title to the whole of a tract of land in which they owned an undivided half interest.

This Court should sustain their contention.

O'Keefe v. New Orleans, 273 Fed., text 561.

The rule is there declared to be that unless the motion clearly discloses that on the allegations of the bill, which are taken to be true, it must be dismissed upon final hearing, the preliminary motion to dismiss must be denied.

The bill prays for other and different relief:

Admitting only for the purpose of this argument that Sanchez knew when the patent was delivered in 1898, that Davis would claim under it the whole 175 acres—yet the bill should not have been dismissed.

All that appears on the face of the bill is that Davis obtained delivery of the patent in 1898 and conveyed the entire grant in 1913.

A conveyance of the common estate by one co-tenant does not amount to an ouster until the right to hold adversely is asserted under it.

Justice v. Lawson, 46 W. Va. 163, 33 S. E. 102.

Here appellants did not know appellee had any claim of title until after the bill was being prepared.

Should the trial Court on the testimony refuse a decree declaring appellee to hold the legal title as trustee, of the lands granted to Fornells, yet it could and should make the decree without prejudice to a suit for partition, the lands and riparian rights never having been possessed adversely to the estate of appellants therein.

Sections 2934 Rev. Genl. Statutes of Florida.

Both by the District Court and the Court of Appeals have wholly overlooked the grant made to Venancio Sanchez by the State of Florida by Chapter 791 Laws—the Riparian Act set out in paragraph 12 of the bill, and the prayer of the bill that defendant be decreed to convey to William J. Sanchez the legal title to an undivided half interest in the submerged lands lying on the Bay of Florida, within the extended lines of the survey of the grant to Pedro Fornells.

In 1856 the State of Florida, owner of the submerged lands between high and low water in the Bay of Florida, granted in fee to Venancio Sanchez, owner of an undivided half of the grant to Pedro Fornells the submerged lands to navigable water in front of said grant, measuring on the ocean and bay more than a mile.

Chapter 791 Laws of Florida; McClellan's Digest p. 689; Revised Statutes Section 454.

The State's grant is perhaps more valuable than the 175 acres of low sands, overflowed by hurricane tides, granted by Spain to Fornells.

Venancio Sanchez died seized of this riparian right. Neither he nor Mary Ann Davis took actual occupancy of this submerged land. It is now and since 1850 has been wholly without any occupancy and in the constructive possession of the holders of the legal title, a title separate and distinct from the title vested in Mary Ann Davis' heirs by the patent from the United States.

The District Court and the Court of Appeals were asked to determine and declare where the legal title to this valuable property now rests. If Waters Smith Davis never had any occupancy of this submerged land, nor his mother before him, could he convey to defendant more than the estate or interest granted by the State of Florida to the co-tenant of Vernancio Sanchez in 1850?

We respectfully ask this Court to find and declare whether William J. Sanchez as sole heir of his father and owner in fee of the submerged lands in front of the lands described in the patent to the extent of an undivided one-half interest, is barred from asserting his claim in a Court of Equity?

The grants from the State vested not an equitable estate but a legal one. How has that vested legal estate been divested or transferred to appellee? Are not appellee and complainant William J. Sanchez' tenants in common of this legal estate? Is not either party entitled to a partition of this estate?

The motion to dismiss should have been denied by the District Court, and the decree appealed from should be reversed and the case remanded with directions.

WILLIAM WHITWELL DEWHURST,
*Solicitor for Appellants.*